STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v	No. 289802 Genesee Circuit Court
JAMES EDWARD CARRODINE, Defendant-Appellant.	LC No. 07-020898-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to life imprisonment for the murder conviction and to a concurrent term of 480 to 720 months' imprisonment for the criminal sexual conduct conviction. He appeals as of right. We affirm.

Defendant's convictions arose from the 1997 murder and sexual assault of a 14-year-old girl. Although the initial police investigation did not lead to any suspects, various items of physical evidence were submitted for retesting in 2003, and led to the discovery of a seminal stain on the victim's sock. A DNA profile was developed and entered into the Combined DNA Indexed System (CODIS). In 2005, a CODIS hit led to defendant. Additional testing confirmed the presence of defendant's DNA on the victim's sock. Defendant was interviewed in May 2006. He stated that he was at work at the time the victim was killed, but that he knew who killed her. Following his interview, defendant was arrested. At trial, a witness contradicted defendant's claim that he was working at the time of the offense. In addition, two witnesses who shared a jail cell with defendant testified that defendant told them that he had killed a young girl.

I. PREARREST DELAY

We first address defendant's claim that the delay between the 2005 CODIS hit and his arrest in May 2006 violated his due process rights. Defendant did not move for dismissal on the basis of prearrest delay or otherwise raise this issue below. Therefore, this issue is unpreserved. In general, "[a] challenge to a prearrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). However, because this issue is unpreserved, it is reviewed for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 219-220; 673 NW2d 800 (2003). Appellate relief is precluded unless (1) defendant demonstrates a plain (i.e., clear or obvious)

error that likely affected the outcome of the lower court proceedings, and (2) this Court determines that the error resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"In order to demonstrate a violation of the right to due process on the basis of preindictment or prearrest delay, a defendant must show actual and substantial prejudice to his right to a fair trial." *Musser*, 259 Mich App at 220. "A general claim that the memories of witnesses have suffered is insufficient to demonstrate prejudice." *Id*.

This Court recently summarized the law governing a prearrest delay claim in *People v Patton*, 285 Mich App 229, 236-237; 775 NW2d 610 (2009), as follows:

> Mere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested. Rather, the guideline is whether the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process.
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> Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial . . . . Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected. "[A]ctual and substantial" prejudice requires more than generalized allegations. If a defendant demonstrates prejudice, the prosecution must then persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted. [Citations and quotation marks omitted.]

Here, defendant argues that he was prejudiced by the delay because he could not test physical evidence, but he does not identify how the evidence might have benefited him. Nonspecific, speculative claims of lost evidence do not establish actual and substantial prejudice. *Cain*, 238 Mich App at 109-110; *People v Adams*, 232 Mich App 128, 137; 591 NW2d 44 (1998). In *Adams*, *id*. at 130-131, 137, the Court stated:

> Defendants were charged in 1995 with the November 3, 1983, strangulation murder of Anna Marie Turetzky in Woodhaven, Michigan. Turetzky, defendant Desai's business partner in the operation of a medical clinic, was found dead in her automobile parked behind a local motel. Desai had allegedly solicited defendant Adams to commit the murder.
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> * * *
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> Certain physical evidence was . . . stipulated by the parties to be missing: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police; an "Anarchist's Cookbook" once possessed by Adams; the contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue

> paper allegedly found by Turetzky family members in the victim's automobile after her murder and after a search of the car by the police.
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> * * *
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> Defendants have . . . failed to show actual and substantial prejudice by reason of the missing physical evidence. Defendants contend that the loss of the physical evidence has denied them the opportunity to conduct testing, such as fingerprint analysis, to determine whether the evidence may have been exculpatory. However, this argument, too, rests upon speculation. Defendants have not substantiated the potentially exculpatory aspects of this physical evidence, for instance, by delving into the substance of the missing tape-recorded conversations or explaining how the loss of the tissue paper and Anarchist's Cookbook, incriminatory in nature, prejudiced their defense.

Similarly, defendant here does not show "actual and substantial prejudice . . . ." *Id*. at 137. Moreover, defendant fails to specify how the lost rape-kit evidence might have benefited him. The results of the vaginal and anal swabs were available and no DNA was found on them. Although defendant also asserts that the delay allowed for two jailhouse snitches to surface, he does not explain how the delay impaired his ability to defend against the witnesses' accusations. Accordingly, defendant has failed to demonstrate that he was prejudiced by the delay and has clearly failed to satisfy the *Carines* standard for appellate relief.

II. MOTION TO SUPPRESS

Defendant argues that the trial court erred in denying his motion to suppress his statements to the police. Defendant argues that the police improperly continued to question him after he asserted his right to counsel.

This Court reviews a trial court's factual findings at a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). "However, this Court reviews de novo a trial court's conclusions of law and ultimate decision regarding a motion to suppress evidence." *Id*.; see also *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007).

The following exchange occurred during defendant's police interview:

> *Sergeant Teddy*: [I]f it wasn't you that killed her, then the time frame is so short, you would've run into the killer coming in and out of that apartment.
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> *Defendant*: See, I don't—see, I don't—see, right now, I gotta say, on there I need a lawyer or whatever. Because I don't know how long it take or whatever. I don't I'm not even saying that I actually—you know what I mean? 'Cause I—'cause I—right now, like I—but see—you all got—if—if— . . . .

Defendant thereafter continued speaking, without further reference to a lawyer.

As explained in *People v Tierney*, 266 Mich App 687, 710-711; 703 NW2d 204 (2005):

> When a defendant invokes his right to counsel, the police must terminate their interrogation immediately and may not resume questioning until such counsel arrives. *Edwards v Arizona*, 451 US 477, 482; 101 S Ct 1880; 68 L Ed 2d 378 (1981). However, the defendant's invocation of his right to counsel must be unequivocal. *Davis v United States*, 512 US 452, 457; 114 S Ct 2350; 129 L Ed 2d 362 (1994). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id*. at 459.

Here, the trial court did not clearly err in finding that defendant's passing reference to a lawyer was not an unequivocal invocation of the right to counsel. After making the reference and before any further questioning by the interrogating officer, defendant continued his lengthy explanation in response to the officer's question. Under the circumstances, it was reasonable for the officer to believe that defendant's passing reference to a lawyer was not intended as an unambiguous expression of a present desire for counsel. See, generally, *People v Granderson*, 212 Mich App 673, 676-677; 538 NW2d 471 (1995). Therefore, the trial court did not err in denying defendant's motion to suppress.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that improper remarks by the prosecutor during closing arguments denied him a fair trial. Because defendant did not object to the prosecutor's remarks at trial, this issue is not preserved. Review of unpreserved claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Error requiring reversal will not be found where a curative instruction could have alleviated any prejudicial effect, given that jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Brown*, 279 Mich App at 134. Defendant argues that the prosecutor improperly accused defense counsel of attempting to mislead the jury when she stated during closing arguments that there were "red herrings" in the case. "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). "However, the prosecutor's comments must be considered in light of defense counsel's comments." *Id*. at 592-593. The prosecutor was specifically responding to an inaccurate statement made in defense counsel's opening statement; she even referred to the opening statement during her comments. Thus, no plain error is apparent. At any rate, even if the prosecutor's remarks were improper, a timely objection could have cured any perceived prejudice, and reversal is not required.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to request a mere presence instruction, CJI2d 8.5, as part of the trial court's instruction on aiding and abetting.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, review of this issue is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

The trial court instructed the jury on aiding and abetting because of evidence that defendant allegedly indicated that someone else was also involved in the crime. However, the defense theory at trial was that defendant was not present during the commission of the crime. Defendant has not overcome the presumption that defense counsel declined to request an instruction on mere presence as a matter of strategy, to avoid any suggestion that defendant may have been present during the offense. Accordingly, defendant has not established that defense counsel was ineffective.

V. GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that the jury's verdict was against the great weight of the evidence. Because defendant did not preserve this issue by raising it in a motion for a new trial, our review is limited to ascertaining whether plain error occurred that affected defendant's substantial rights. *Musser*, 259 Mich App at 218. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 218-219.

Defendant argues that the jury's verdict was against the great weight of the evidence because his expert's testimony so impeached the police serologist's testimony as to deprive it of all probative value. However, conflicting testimony alone will not typically warrant reversal. *Id*. at 219. Rather, "[u]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. (citations and quotation marks omitted).

The expert witnesses simply presented two opposing views regarding scientific interpretation of the evidence. Defendant presented no evidence to support a conclusion that the defense expert's interpretation was the only scientifically viable one. Furthermore, in addition to the opinion testimony of the police serologist, evidence was presented establishing defendant's presence near the vicinity of the crime, contradicting defendant's claim that he was working at the time of the offense. Evidence was also presented indicating that defendant made inculpatory statements to two different witnesses. The jury's verdict was not against the great weight of the evidence.

VI. CUMULATIVE ERROR

Lastly, defendant argues that the cumulative effect of multiple errors deprived him of a fair trial. Because we have not found multiple errors, there was no cumulative effect requiring reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). There was no aggregation of errors that denied defendant a fair trial. *Id*. at 107.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering